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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Deployment of Wireline Services)
Offering Advanced Telecommunications)
Capability)

CC Docket No. 98-147

Reply Comments of Network Plus, Inc.

Network Plus, Inc. ("Network Plus"), by undersigned counsel, hereby submits its Reply to the Comments filed by interested parties in the above-captioned proceeding concerning deployment of advanced telecommunications capability to all Americans.^{1/}

I. SEPARATE AFFILIATES

A. The Commission's Advanced Services Affiliate Proposal Is Inconsistent with the Purpose of Section 251.

The core provisions of Section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), are the market opening obligations placed on ILECs to help achieve Congress' goal of building a competitive market for the provision of local telecommunications. The Commission's proposal to allow ILECs to provide advanced services through unregulated affiliates is inconsistent with the purpose of Section 251, namely to apply procompetitive unbundling obligations to ILECs. The Commission's proposal establishes

^{1/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, rel. Aug. 7, 1998 ("NPRM").

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mechanisms that permit ILECs to escape these obligations by passing to the unregulated advanced service affiliate virtually all of the advantages and status of incumbency, with none of the corresponding obligations. If the Commission decides to adopt some variation of its separate affiliate proposal, Network Plus strongly recommends that the Commission modify the proposal so that any *de minimis* transfer of assets (which Network Plus strongly opposes as violating the Act) be subject to a nondiscrimination requirement and that the safeguards be strengthened.

B. Stringent Safeguards Are Necessary to Prevent Advanced Services Affiliates From Enjoying Anticompetitive Advantages.

In particular, the Commission should prevent an unregulated advanced services affiliate from gaining an unfair advantage through its association with its parent ILEC. In their initial comments, the staff of the Bureau of Economics of the Federal Trade Commission ("FTC") recommends that the Commission impose restrictions on an affiliate's use of the parent ILEC's trade name and logo and on joint marketing activities between the ILEC and its affiliate. FTC at 4-5. Network Plus strongly supports these recommendations; indeed, Network Plus made similar recommendations in its initial comments. Network Plus at 5.

ILECs claim that there is no reason to prohibit an ILEC and an unregulated advanced services affiliate from using the same trade name or logo. Bell Atlantic at 31; CBT at 17; GTE at 45-46. However, as the FTC notes, allowing an affiliate to use the trade name or logo of its parent ILEC presents an opportunity and incentive for anticompetitive cross-subsidization by the ILEC. FTC at 7. Moreover, allowing the unregulated affiliate to use the trade name or logo of the parent ILEC may also convey a deceptive claim if it leads consumers to believe that the relationship is closer than

it really is. FTC at 8. An unregulated advanced services affiliate using the ILEC's trade name or logo will be undeservedly more attractive to consumers who already use the ILEC for their local service and want advanced services as part of a single package sold by one telecommunications company. Network Plus urges the Commission, as did many commenters, to prohibit an unregulated advanced services affiliate from using the trade name or logo of the parent ILEC. Hyperion at 4; McLeod at 5; Qwest at 45; Telehub at 4; Transwire at 17; TRA at 35; US Xchange at 5.

As the FTC also pointed out in its comments, "In light of the LECs' monopoly in traditional telephone service, LECs will be uniquely positioned to market advanced services to their existing consumers, especially those customers with profiles that indicate that they are likely to desire such services." FTC at 11. The anticompetitive effects of joint marketing outweigh the increased efficiencies touted by ILECs as a reason for allowing such a practice. Ameritech at 54-55; Bell Atlantic at 29. Safeguards are necessary to ensure that unregulated advanced services affiliates do not enjoy special advantages to the detriment of CLECs. To guarantee a competitive market from the outset, the Commission should prohibit joint marketing of services by an ILEC and its unregulated advanced services affiliate.

C. Federal Preemption of Inconsistent State Regulation May Be Necessary.

Network Plus agrees with ILEC commenters who urge the Commission to reserve the right to preempt inconsistent state law. GTE at 28-29; CBT at 18; Kiesling at 11; U S WEST at 34. Network Plus does not, however, share the ILECs' concern that the states would adopt more rigorous safeguards; more rigorous safeguards would not undercut the Commission's safeguards. As

Network Plus indicated in its comments, the Commission's failure to preempt contradictory or less rigorous state regulation leaves in place state authority to authorize significant transfers to any affiliate, or adopt relaxed safeguards for the affiliate's provision of intrastate services. Network Plus at 7. This *laissez-faire* approach could undermine the very safeguards the Commission proposes to establish.

II. PROMOTION OF COMPETITION IN THE LOCAL MARKET

A. The Commission Should Strengthen Its National Collocation Rules.

Network Plus supports the Commission's proposal to establish national collocation standards. ILECs offered vague, unsupported allegations opposing national standards, but failed to show in their initial comments that their networks or operating conditions are so different that national standards would be unreasonable. Ameritech at 39; Bell Atlantic at 37; GTE at 62. As pointed out by Network Plus in its comments, ILEC's inconsistent standards for collocation create unreasonable delays for carriers such as Network Plus that seek to enter numerous markets. Network Plus at 8. The Commission should adopt national standards as minimums to be supplemented by the states, making clear that the state rules may not undercut the federal rules. Adoption of stronger and more detailed standards would encourage the deployment of advanced services by increasing predictability and certainty for CLECs seeking to establish collocation in multiple states.

1. Collocation of CLEC Equipment.

The Commission should reject the ILECs' request to deem eligible for collocation only equipment used exclusively for interconnection or access to unbundled network elements.

Ameritech at 39; Bell Atlantic at 38-39; CBT at 20-21; GTE at 61-62; SBC at 15-16; U S WEST at 36-38. Network Plus urges the Commission to require ILECs to allow collocation by CLECs of *any* telecommunications equipment, regardless of voice or data classification, including, for example, Digital Subscriber Line Multiplexers ("DSLAMs") and remote access management equipment. In addition, Network Plus urges the Commission to require ILECs to offer cageless or shared collocation. ILECs failed to show in their initial comments that the Commission should prohibit either type of collocation because of security issues. Indeed, some ILECs already permit cageless collocation. Ameritech at 42. Cageless or shared collocation provides new entrants a significant opportunity to collocate equipment in ILEC central offices without incurring the cost and delay of obtaining and installing cages.

2. Terms and Conditions for Collocation.

Whether or not the Commission chooses to establish a cageless or shared collocation obligation, it should set minimum terms and conditions for collocation generally, including procedures that CLECs use to obtain collocation. The Commission should reject the ILECs' proposal to have their provision of collocation and unbundled network elements supervised on a case-by-case basis by state authorities. Ameritech at 46; BellSouth at 46-47; CBT at 24; GTE at 97; SBC at 29; U S WEST at 42. After-the-fact review of the timeliness of ILEC's provisioning of collocation and unbundled network elements is too late to prevent the delaying tactics of ILECs, which can lead to an irretrievable loss of customers for CLECs. As Network Plus suggested in its initial comments, the Commission should eliminate this opportunity for ILECs to thwart competition

by imposing reasonable national time intervals for ILECs to meet their collocation and unbundling obligations under the Act. Network Plus at 9.

The Commission should also modify its rules to ensure that sufficient space is available for competitive carriers. Current rules that require ILECs to give up space before denying virtual, but not physical, collocation provide no meaningful constraint on an ILEC's ability to warehouse space. The Commission should clarify the standards for the amount of space ILECs may reserve and require that, prior to denial of physical collocation, ILECs give up any space held in reserve. In addition, Network Plus recommends that the Commission reject ILEC's claim that the requirement to provide tours of central offices where ILECs allege space exhaustion would be unduly burdensome. Ameritech at 47; Bell Atlantic at 43; BellSouth at 47; CBT at 26; GTE at 72; SBC at 29; U S WEST at 43. Because ILECs have the incentive and ability to impede competition by reducing the amount of space available for collocation, the Commission should draft a rule permitting CLECs, as well as state and federal regulators, to tour the central office upon ILEC allegations of space exhaustion. Network Plus also supports the Commission's proposal to require ILECs to provide to CLECs a report showing available collocation space. ILECs have not shown that publishing such information would impose infeasible requirements or unreasonable burdens. Therefore, the Commission should reject ILECs request to allow parties to resolve issues concerning the need for such information on a case-by-case basis. BellSouth at 47; CBT at 22; GTE at 74; GVNW at 9; SBC at 20.

B. The Commission Should Strengthen Its Loop Unbundling Requirements.

Network Plus shares the Commission's concern that its current loop unbundling requirements do not fully ensure that competitive providers have adequate access to the "last mile." In order for CLECs to provide any telecommunications service, advanced or basic, they must have access to the monopolist's bottleneck local loop. Network Plus recommends that the Commission adopt strong national standards for loop unbundling. These national standards should serve as minimum requirements, allowing states to adopt additional local loop requirements or to respond to state-specific issues.

Network Plus urges the Commission to require ILECs to provide conditioned loops, free of bridge taps, load coils and midspan repeaters, upon request. As noted by Network Plus and other commenters, conditioned loops are essential for the provision of advanced services. Network Plus at 10; Allegiance at 1; CTSI at 10; GST at 33; KMC at 19; NEXTLINK at 19-21; US Xchange at 10; xDSL at 5. Contrary to ILEC claims, loop conditioning is not a special or superior service. Ameritech at 11; Bell Atlantic at 47; U S WEST at 45-46. Loop conditioning (removing or installing various devices on the loop) is a commonplace activity necessary to ensure that the loop is technically able to provide various services and thus is not an unduly burdensome requirement. In addition, Network Plus recommends that the Commission strengthen its unbundling rules to require ILECs to permit CLEC's interconnection at and access to fiber huts and other remote terminals where copper loops are multiplexed to fiber for delivery to the central office. CLECs should have the option of building out their own fiber to remote terminals and establishing a point

of interconnection in such terminals, whether or not sufficient space exists at such remote terminals for collocation.

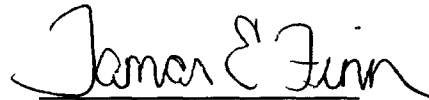
Finally, Network Plus reiterates its recommendation, also made by several other parties in their initial comments, that the Commission require ILECs to offer dark fiber as a network element. Allegiance at 14-16; Qwest at 66-68; RCN at 17-20. Network Plus intends to serve the work-at-home and three to five line small business markets. Although Network Plus is installing its own fiber, without access to dark fiber it could take years for Network Plus or other CLECs to build out into the suburban and residential neighborhoods where these customers are located. While some competitive providers have built or are installing dark fiber to ILEC central offices, the ILECs still control the majority of dark fiber.^{2/}

^{2/} For further discussion of the need to require ILECs to unbundle dark fiber, please see the reply comments of Network Plus on the Commission's Notice of Inquiry in this proceeding, included as an attachment to this document.

Conclusion

For the reasons stated above and in its initial comments, Network Plus urges the Commission to encourage deployment of advanced services and promote competition in the local exchange market. The Commission should ensure that ILECs provide advanced services in a fair and competitive manner and that barriers to entry to the local market are removed. Doing so will help the Commission meet its goal of expeditiously providing advanced telecommunications and information services to all Americans.

Respectfully submitted,



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October 16, 1998

ATTACHMENT A

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable) CC Docket 98-146
and Timely Fashion, and Possible Steps)
to Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

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Reply Comments of Network Plus, Inc.

Network Plus, Inc. ("Network Plus") respectfully submits the following reply comments in response to the Notice of Inquiry ("NOI") issued in the above-captioned proceeding.¹ In these reply comments, Network Plus adds its support to various commenters' suggestions that CLEC access to unbundled dark fiber is essential to their deployment of advanced services.

I. Numerous Commentors Submitted Evidence that Competition and Market Forces Will Ensure the Deployment of ATC So Long As Competitors Have Access to ILECs' Bottleneck Local Networks

Section 706 of the Telecommunications Act of 1996 ("1996 Act") requires the FCC to initiate a NOI concerning the availability of advanced telecommunications capability ("ATC") and to determine whether ATC is being deployed to all Americans in a reasonable and timely fashion. Numerous competitive carriers, including Network Plus, and other service providers (*e.g.*, cable companies) submitted initial comments in this proceeding showing that they are offering, or plan to

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. Aug. 7, 1998) ("NOI").

offer, ATC to consumers. *See, e.g.*, AT&T Corp. at 14-15, 18-23; DSL Access Telecommunications Alliance ("DATA") at 4; Intermedia Communications, Inc. at 11; Qwest Communications Corporation at 10-13; Time Warner Cable at 4; Williams Communications, Inc. at 4.

However, in their initial comments, competitive carriers also showed that their ability to provide advanced services, such as xDSL, depends on nondiscriminatory access to clean, unbundled incumbent local exchange carrier ("ILEC") local loops and the ability to collocate at ILEC premises. *See, e.g.*, AT&T at 6-7, 43; Intermedia at 13; MCI Communications/WorldCom, Inc. at 3; Qwest at 23-24. Furthermore, unless access to unbundled loops and physical collocation is provided at incremental cost-based rates, the ILEC will always be able to use its monopoly over the bottleneck local loop to underprice its competitors. *See, e.g.*, DATA at 18 (disparity between rates charged by ILECs for wholesale inputs and retail prices charged to consumers acts as price squeeze on CLECs); Northpoint Communications, Inc. at 6 (FCC should require ILECs to impute loop and collocation costs in their ADSL tariffs). The FCC can and should address these barriers to the deployment of ATC in its *Advanced Services NPRM*.²

II. The FCC Should Establish a Record Necessary to Show that Dark Fiber is a Network Element that ILECs Must Unbundle

In their initial comments, both Qwest and Allegiance Telecom, Inc. recommended that the FCC require ILECs to provide dark fiber to CLECs on an unbundled basis. Qwest at 23; Allegiance

² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("*Advanced Services NPRM*").

at 4-6. Network Plus strongly supports these recommendations; indeed, Network Plus made a similar recommendation in its comments on the FCC's *Advanced Services NPRM*. Network Plus intends to serve the work-at-home and 3 to 5 line small business markets. Although Network Plus is installing its own fiber, without access to ILEC dark fiber, it could take years for Network Plus to build out into the suburban and residential neighborhoods where these customers are located. While some competitive providers have built or are installing dark fiber to ILEC central offices, the ILECs still control the majority of such dark fiber.

In its *Local Competition Order*, the FCC determined that it did not have a sufficient record before it to determine whether dark fiber qualified as a network element.³ However, many state public utilities commissions, in the context of arbitrating interconnection disputes between ILECs and CLECs, have found that dark fiber is a network element that must be unbundled. (*See, e.g.*, decisions listed in Attachment A.) At least three federal district courts reviewing interconnection agreements have also agreed that dark fiber is a network element. *MCI v. BellSouth Telecommunications*, 7 F.Supp.2d 674 (E.D.N.C. 1998) (finding dark fiber is a network element and remanding to Commission to determine whether BellSouth's failure to provide MCI access to dark fiber would impair MCI's ability to provide services it seeks to offer); *MCIMetro Access*

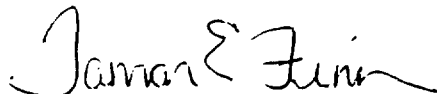
³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶450 (1996) ("*Local Competition Order*"), *vacated in part and aff'd in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

Transmission Services, Inc. v. GTE Northwest, Inc., No. C97-9058WD, slip op. (W.D. Wash. July 7, 1998) ("WUTC-properly determined that 'dark fiber' is a network element under 47 U.S.C. § 251(c)(3)"); *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, Order at 11-14 (W.D. Tex. Aug. 31, 1998). In rejecting the North Carolina Commission's determination that dark fiber was not a network element, Judge Britt reasoned that:

[m]ost persuasive is the general tenor of the Eighth circuit decision in Iowa Utilities. That decision expanded the definition of network elements to include non-physical elements. If non-physical elements are brought under the definition, it seems only logical that an expansion to a true physical element which may not have been explicitly contemplated by Congress is more than warranted.

MCI v. BellSouth, 7 F.Supp.2d at 680. Network Plus urges the FCC to use the *Advanced Services NPRM* docket to establish a record that shows dark fiber is a network element that ILECs must provide to CLECs on an unbundled basis.

Respectfully submitted,



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October 8, 1998

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Attachment A

In re Petition by AT&T Communications of the South Central States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Alabama, Inc., Docket No. 25704, Arbitration Report and Recommendation at 42 (Ala. Pub. Serv. Comm'n Jan. 31, 1997) ("Dark fiber clearly is a network element");

Re MCI Telecommunications Corp., 1996 WL 773337, *49 (Ga. P.S.C. Dec. 17, 1996) (Docket No. 6865-U) (dark fiber is a network element);

Re New England Telephone and Telegraph Company dba NYNEX, 1996 WL 773739, *24-25 (Mass. D.P.U., Dec. 4, 1996) (Docket Nos. D.P.U. 96-73, 96-74, 96-80, 96-75, 96-81, 96-83, 96-94 Phase 3) (dark fiber is a network element);

AT&T Communications of Michigan, Inc.'s Petition for Arbitration of Interconnection Terms, Conditions and Prices from GTE, Notice of Decision of Arbitration Panel at 48-49 (Mich. Pub. Serv. Comm'n Nov. 12, 1996) ("AT&T should have access to GTE's unused transmission media ('dark fiber')."), aff'd, In re the Petition of AT&T Communications of Michigan for Arbitration to Establish an Interconnection Agreement with GTE North, Order Approving Agreement Adopted by Arbitration at 3 (Dec. 12, 1996);

In re Consolidated Petition of AT&T Communications of the Midwest, et al. for Arbitration with US West Communications, Docket No. P-422, 421/M-96-855, Order Resolving Arbitration Issues and Initiating a US West Cost Proceeding at 23 (Minn. P.U.C. Dec. 2, 1996) (dark fiber must be unbundled and offered as a network element);

In re the Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection with US West Communications, Inc., Docket No. D96.11.200, Order No. 5961b, Arbitration Decision and Order at 33 (Mont. Pub. Serv. Comm'n Mar. 20, 1997) ("U S West must provide access to its dark fiber as an unbundled network element);

AT&T Communications' Petition for Arbitration of Interconnection Terms, Conditions and Prices from U S West, Preliminary Decision on Issues for Arbitration of Interconnection Agreement between U S West and AT&T in the State of Neb. At 19 (Neb. Pub. Serv. Comm'n Dec. 12, 1996) (dark fiber is a network element and must be unbundled);

In re the Interconnection Contract between AT&T Communications of the Mountain States, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. 96-411-TC, Findings of Fact, Conclusions of Law and Order at 45 (N.M. State Corp. Comm'n Mar. 20, 1997) ("US West must provide dark fiber as an unbundled network element.");

AT&T Communication of the Midwest, Inc. Interconnection Arbitration Application, Case No. PU-453-96-497, Arbitrator's Decision at 28 (N.D. Pub. Serv. Comm'n Mar. 19, 1997) (U S West must unbundle dark fiber);

In re MCI Telecommunications Corp., 1997 WL 120999, *3 (Ohio P.U.C., Feb. 20, 1997) (Docket No. 96-888-TP-ARB) (dark fiber is network element and the failure to provide access would impair MCI's ability to provide services);

In re the Petition of AT&T Communications of the Pacific Northwest, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest, Inc., Arbitrator's Decision at 16 (Or. P.U.C. Dec. 12, 1996) ("GTE must make dark fiber available on an unbundled basis"), aff'd, Commission Decision at 2 (Jan. 13, 1997);

In re Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecomm., Inc., Docket No. 96-358-C, Order No. 97-189, Order on Arbitration at 13 (S.C. Pub. Serv. Comm'n Mar. 10, 1997) ("[D]ark fiber is a network element because it is a facility or equipment used in the provision of a telecommunications service.");

MCI Telecommunications Corp., 1997 WL 182585, *36 (Tenn. R.A., March 7, 1997) (Docket No. 96-01271) (dark fiber is a network element).

In re the Petition of Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Inc., Arbitrators's Report and Decision at 37 (Wash. Utils. & Transp. Comm'n Dec. 11, 1996) at 37 ("GTE must offer dark fiber as a network element");

Petition for AT&T Communications of Wisconsin for Arbitration to Establish an Interconnection Agreement with GTE North Inc., Decision of the Arbitration Panel at 51 (Wisc. Pub. Serv. Comm'n Dec. 12, 1996) (dark fiber is a network element).

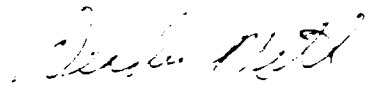
CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that I have on this 8th day of October, 1998, served copies of the foregoing Reply Comments of Network Plus, Inc. on the following via hand delivery:

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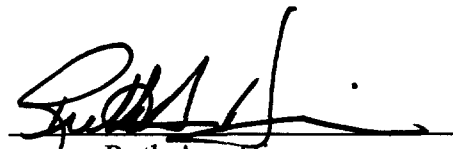


Wendy Mills

CERTIFICATE OF SERVICE

I, Ruth Ann Hinson, hereby certify that a copy of the foregoing **Reply Comments of Network Plus, Inc. in Docket 98-147** was sent via Messenger or First-Class Mail*, U.S. postage prepaid, to the parties on the attached service list on this 16th day of October, 1998.

SEE ATTACHED SERVICE LIST



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